United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

77-1057

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UNITED STATES OF AMERICA

Plaintiff-Appellee

-v-

Docket No. 77-1057

JOHN EVANS and MARCUS HAND

Defendants-Appellants

----------x

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APPELLANTS' JOINT BRIEF

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UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,

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- against -

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APPELLANTS JOINT BRIEF

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TABLE OF CONTENTS

TABLE OF CASES

OTHER ACTIVITIES:

PRELIMINARY STATEMENT

JOHN EVANS and WILLIAM WOOD, JR., indicted as MARCUS HAND, appeal from judgments of conviction entered December 9, 1976 and January 20, 1977 respectively in the United States District Court for the Southern District of New York after separate jury trials before the Honorable Frederick Van Pelt Bryan.

Indictment 76 Cr. 502, filed on May 24, 1976 charged both defendants with conspiracy and bank robbery, in violation of Title 18, United States Code, Sections 371, 2113(a) and 2113(d).

On April 9, 1976 the Government began presenting evidence of the alleged bank robbery charged in Indictment 76 Cr. 502 to a Grand Jury in the Southern District of New York.

EVANS and HAND, who were incarcerated awaiting trial on unrelated charges in Pennsylvania State Court, were brought before the Grand Jury in New York on April 20, 1976 pursuant to writs of habeas corpus ad testificandum. During their stay in New York on April 27, 1976, a Grand Jury in the Eastern District of Pennsylvania indicted EVANS and HAND on charges arising out of an alleged bank robbery in Pennsylvania.

On May 7, 1976, EVANS and HAND were returned to

the custody of the Commonwealth of Pennsylvania after declining to testify voluntarily before the Grand Jury. On May 24, 1976 EVANS and HAND were indicted in the Southern District of New York on Indictment 76 Cr. 502.

On or about September 7, 1976 EVANS and HAND were returned to the Southern District of New York to stand trial on Indictment 76 Cr. 502, pursuant to writs of habeas corpus ad prosequendum.

On October 5, 1976, a Simmons hearing was held on the issue of identification of photographs of the defendants taken during the bank robbery. Testimony was taken from CHARLES J. HARTE and ANNE MCSHANE, employees of the bank, and PAUL D. O'REILLY, a customer of the bank during the bank robbery. The Honorable Frederick Van Pelt Bryan ruled in regard to the F.B.I., "the photo spreads that were shown to these witnesses were not impermissibly or unnecessarily suggestive in light of the totality of the surrounding circumstances." (see Appendix Page).

The defendants' joint trial commenced October 5, 1976 and concluded one week later with a hung jury. Following the granting of EVANS motion for a severance, the retrial of EVANS began on October 26, 1976 and ended with a jury verdict of guilty on October 29, 1976.

The retrial of HAND began December 15, 1976 and ended with a jury verdict of guilty on December 20, 1976.

HAND and EVANS were not formally arraigned until after their joint trial. EVANS was not arraigned until just

before his second trial. HAND was not arraigned until just prior to his second trial.

On December 9, 1976 Honorable Judge Bryan sentenced JOHN EVANS to a term of twenty (20) years imprisonment on count two (2) of the indictment.

On January 20, 1977 Honorable Judge Bryan sentenced WILLIAM WOOD, JR. indicted as MARCUS HAND to a term of ten (10) years imprisonment on Count two (2) to run concurrently with HANDS twenty (20) year sentence in the Eastern District of Pennsylvania.

STATEMENT OF FACTS

A. THE PROSECUTION'S CASE AGAINST DEFENDANT, EVANS

JAMES V. GALANTE, an investigator for the Chase Manhattan Bank (EVANS transcript 25 hereinafter referred to as ETT), testified that he responded to a branch bank at Third Avenue and 39th Street in Manhattan (ETT 26) and received two rolls of film from the bank's surveillance cameras (ETT 26), GALANTE took the film to his film laboratory (ETT 27), initialed the negatives and later turned over the negatives to the F.B.I. Office on 69th Street in Manhattan (ETT 27).

CHARLES J. HARTE, Assistant Treasurer and branch executive of the Chase Manhattan Bank at 580 Third Avenue (ETT 30) testified that on August 1, 1975 there was a scuffle in the bank (ETT 33). HARTE, who claimed he could identify EVANS, admitted he was lying on the floor between a file cabinet and desk (ETT 88) with his vision partially obstructed by pillars and plants (ETT 91). HARTE, who wears glasses, further admitted that he did not have his glasses on (ETT 39, 69) for the two or three seconds (ETT 80) during which he claimed to identify EVANS. HARTE stated that he was ordered at gunpoint to lie down on the floor (ETT 34-35) by a man in a salmon colored suit who was not the defendant EVANS (ETT 33-34).

HARTE testified that in early March he was shown a

spread of six (6) photos by the F.B.I. from which he identified EVANS (ETT 40).

HARTE identified EVANS in Court as the participant in the robbery who directed the other perpetrators in the bank (ETT 46).

JAMES J. PORTER, a resident of Philadelphia, Pennsylvania testified as a prosecution rebuttal witness that he was EVANS in Philadelphia July 29, 1975 (ETT 197-198).

GENE BRYANT, a resident of Philadelphia, Pennsylvania testified as a prosecution rebuttal witness that he was EVANS ir Philadelphia July 29, 1975 (ETT 198-199).

B. THE PROSECUTION'S CASE AGAINST DEFENDANT HAND

JAMES V. GALANTE, an investigator for the Chase Manhattan Bank (HAND transcript 29, hereinafter referred to as HTT) testified that he responded to a branch bank at Third Avenue and 39th Street in Manhattan and received two rolls of film from the bank's surveillance cameras, August 1, 1975 (HTT 31). GALANTE took the film to his film laboratory, initialed the negatives (HTT 32) and later turned over the negatives to the F.B.I. office on 69th Street.

ANNE Mc SHANE, a general clerk with the Chase Manhattan Bank, testified that she worked at the Third Avenue and 39th Street Branch, August 1, 1975 when a bank robbery occurred

(HTT 49-56). McSHANE, who could not identify any of the perpetrators at first (HTT 65), and could not recall the length of the bank robbery (HTT 70) identified the defendant as one of the alleged bank robbers (HTT 60), but McSHANE used the term "resembled" (HTT 71) in identifying HAND through photographs. McSHANE had earlier claimed that HAND leaped over the teller's counter at a pre-trial hearing of the first trial at the first joint trial and in the instant case, but at trial changed her original testimony to state that she was never behind the teller's counter (HTT 105-106).

PHILLIP HELD, general manager of Amtrak (HTT 138) testified that by the use of computer records (HTT 140) that defense witness MABLE CREWS brought her tickets at Amtrak on July 31, 1975 (HTT 155). HELD admitted that his machines break down and were subject to human error (HTT 156) and that he had no personal knowledge of the alleged ticket transaction other than through the records.

C. DEFENDANT EVANS' CASE

DESIREE MITCHELL, a resident of Chicago, Illinois, testified that she was EVANS on August 1, 1975 (the date of the alleged crime) between 3 and 4 A.M. in the morning in Chicago, Illinois (ETT 146). MITCHELL stated that EVANS came to her home with Willie Davis and that EVANS stayed in her home from early morning until the after of August 1, 1975 (ETT 147).

WILLIE DAVIS, who testified at EVANS' first trial, could not be located to testify at the second trial. DAVIS' prior recorded testimony was read to the jury (ETT 185). DAVIS a resident of Chicago, Illinois, testified that he was EVANS' roommate on August 1, 1975 in Chicago (ETT 186).

DAVIS testified further that he was with EVANS in Chicago on August 1, 1975 and dropped EVANS off at Desiree Mitchell's home between 4 A.M. and 5 A.M. on August 1, 1975 (ETT 190).

D. DEFENDANT HAND'S CASE

ARTIS INGRAHAM, a resident of Miami, Florida, testified that she, HAND and her sister MABLE CREWS went to the Florida East Coast Railroad terminal in Miami, Florida on August 1, 1975 (HTT 116), to purchase tickets. INGRAHAM stated that HAND was with her at all times during their ticket purchase (HTT 119).

MABLE CREWS, a sister of ARTIS INGRAHAM, testified that she, INGRAHAM and HAND went to the Miami train station to purchase tickets on August 1, 1975 (HTT 126-127).

POINT ONE: THE PROSECUTIONS OF THE DEFENDANTS WERE VIOLATIVE OF THEIR RIGHTS UNDER THE INTERSTATE AGREEMENT ON DETAINERS ACT.

The defendants in the case at bar were pre-trial detainees on April 20, 1976 in the Commonwealth of Pennsylvania. The Defendants were incarcerated continuously in the Commonwealth of Pennsylvania from December 16, 1975 until April 20, 1976 when the United States Attorney for the Southern District of New York brought them to New York pursuant to writs of habeas corpus ad testificandum. The Prosecution admits that EVANS and HAND were targets of a Grand Jury (Government's Memorandum of Law In Opposition to Defendants' Motion to Dismiss the Indictment, pg.3-4), and after the defendants denied knowledge of the alleged crime and declined to testify voluntarily before the Grand Jury they were shuttled back to the custody of the Commonwealth of Pennsylvania on May 7, 1976. EVANS and HAND were indicted in the Southern District of New York, 76 Cr. 502 on May 24, 1976. The Defendants were brought back to the Southern District of New York to stand trial on or about September 7, 1976 pursuant to writs of habeas corpus ad prosequendum. The defendants' joint trial began October 5, 1976 and ended in a hung jury one week later. Following the granting of EVANS motion for a severance, the retrial of EVANS began on October 26, 1976 and ended with a verdict of guilty on

October 29, 1976.

HANDS' individual retrial began on December 15, 1976 and terminated on a jury verdict of guilty on December 20, 1976. Neither one of the defendants were arraigned on the instant indictment until the start of their second individual trials.

(A) THE INTERSTATE AGREEMENT ON DETAINERS ACT APPLIES TO THE INSTANT CASE.

The Interstate Agreement on Detainers (Agreement) was enacted into law by the Congress in 1970 on behalf of the United States, 18 U.S.C. Appendix ("Agreement"). Its purpose and objectives are set forth in Article I

> The party States find that charges outstanding against a prisoner, detainers based on untried indictments, informations, or complaints and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the States and the purpose of this agreement to encourage the expedious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints. The party States also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

Article II(a) defines the term 'State':

> 'State' shall mean a State of the United States; the United States of America; a territory or

possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

Article IV provides prosecutors with the means to secure prisoners serving sentences in other jurisdictions for a trial within 120 days following his arrival in the receiving jurisdiction.

Although there is sparse legislative history of the Agreement, 116 Cong. Rec. 38840(1970) Congressman Kastenmeier, the sponser of the legislation stated that:

> The Bureau of Prisons has advised that a prisoner who has a detainer lodged against him is seriously disadvantaged. He is in custody and cannot seek witnesses or preserve his defense. He must often be kept in close custody and is ineligible for desirable work assignments. Thus he may lose interest in institutional opportunities because he cannot tell when, if ever, he will be in a position to use the skills he is developing. The agreement offers a prisoner the opportunity to secure a greater degree of certainty as to his future and enables prison authorities to provide better plans for his treatment.

The Agreement was also designed to prevent the Government from shuttling prisoners back and forth from various jurisdictions without having them stand trial, which is exactly what occurred in the case at bar,

> In view of the clear language of Article IV(e), we believe the Agreement was plainly designed to avoid the <u>shuttling of prisoners back and forth between the penal institutions of the two jurisdictions</u>. The disruptive effect upon the prisoner's morale is the same irrespective of the caption on the paper which produces him in the jurisdiction seeking him for trial. (Emphasis added) <u>United States</u> v. <u>Mauro</u>, 544 F.2d 588, 593 (2nd Cir. 1976).

(B) THE WRIT OF HABEAS CORPUS AD TESTIFICANDUM SHOULD BE TREATED AS A DETAINER UNDER THE AGREEMENT

EVANS and HAND were first brought to the Southern District of New York on April 20, 1976 pursuant to writs of habeas corpus ad testificandum pursuant to Title 28 U.S.C. 2241(c)(5). It is the position of the defendants that the use of the writ of habeas corpus ad testificandum pursuant to Titl 28 U.S.C. 2241(c)(5) was the functional equivalent of a req st for custody of a prisoner made under the Interstate Agreement and therefore is tantamount to being a detainer.

It must be noted that the defendants in the case at bar were known by the Government to be targets of the indictment (Government's Memorandum of Law In Opposition to Defendants' Motion To Dismiss The Indictment, pg.3-4), and were brought to the Southern District of New York under the pretext of testifying in their own Grand Jury presentment.

Defendants concede that the writ of habeas corpus ad testificandum is the traditional method employed to obtain witnesses. However, it does not follow that such a writ is not a detainer within the purview of the Interstate Agreement. The Interstate Agreement does not define the term detainer. Congressman Kastenmeier the aforementioned sponsor of the Act has stated that:

> For the purpose of this legislation a detainer is a notification filed with the instiution in which a prisoner is serving a sentence advising that he is wanted to stand trial on pending criminal charges in another jurisdiction.
>
> 116 Cong. Rec. 13999 (1970); S. Rep. No. 1356, 91st Cong. 2d Sess., 3 U.S. Code Cong. and Admin. News 4864, 4865 (1970).

Courts have examined the purposes of writs of habeas corpus in construing their application to the Interstate Agreement. United States ex rel. Esola v. Groomes, 520 F 2d 830 (3rd Cir. 1975), the relator was serving a federal sentence and was transferred by writ of habeas corpus ad prosequendum to New Jersey to stand trial April 21, 1971. On April 27, 1971, he was returned to federal authorities in Connecticut without having been tried. Esola was then returned to New Jersey on June 10, 1971, September 25, 1971 and January 6, 1972 for trial. Esola was ultimately convicted. On appeal, the Government urged that because the transfers of Esola were pursuant to habeas corpus and not under the Agreement, the provisions of the Agreement were not relevant. The Court rejected this contention and stated:

> Were we to hold, as New Jersey urges, that the machinery of the Agreement is not the exclusive means of effecting a transfer for the purpose of prosecution on these allegations, then Article IV(c), requiring prosecution within 120 days of arrival, and Article IV(e) allowing for only one rendition would be meaningless

> Our holding that the Agreement provides the exclusive means of transfer when it is available was foreshadowed by and is fully consistent with the recent case of Grant v. Hogan, 505 F 2d 1220 (3rd Cir. 1974). United States ex rel, Esola v. Groomes, supra, at 837.

It is a principle of law that whenever the Agreement is available for securing the presence of a defendant for the purpose of prosecution, the Agreement is the exclusive means for doing so and the Government is charged with having invoked its provisions by use of thewrit. United States v. Sorrell, 413 F. Supp 138 (E.D.Pa. 1976); United States ex rel, Esola v. Groomes, 520 F 2d 830, 837 (3rd Cir 1975); United States v. Mauro, 414 F. Supp 358, (E.D.N.Y. 1976).

> In Mauro, Supra, at 362 the court held that any other result would provide an easy means for circumvention of the terms of the Agreement and render them meaningless.

In United States v. Sorrell, 413 F. Supp 138 (E.D.Pa. 1976) the defendant was brought to the Eastern District of Pennsylvania on April 2, 1976 for arraignment pursuant to a writ of habeas corpus, ad prosequendum. The defendant was subsequently returned to the State Correctional Institution he was requisitioned from without being tried. The Court ruled that:

> It matters not, as we see it, what the purpose of the transfer was. It is the fact of transfer, and not the reason that is important. In United States v. Ricketson, 498 F.2d 367 (7th Cir. 1974)

the court said at page 373: 'But there are no exceptions to the requirement that defendant not be returned to state custody untried.'

Sorrell, Supra, at 141.

Title 28 U.S.C. 2241(c) 5 defines the power to grant a writ of habeas corpus. EVANS and HAND were prisoners within the purview of that power as defined by section c(5). The statutory basis for both the writ of habeas corpus ad testificandum and the writ of habeas corpus ad prosequendum is identical under 28 U.S.C. 2241(c)5:

> (c) The writ of habeas corpus shall not extend to a prisoner unless -
> (5) It is necessary to bring him into court to testify or for trial.

In United States v. Mauro, 544 F.2d 588 (2nd CIR. 1976) this Honorable Court held that the writ of habeas corpus ad prosequendum constitutes a detainer under the Interstate Agreement. In Mauro both defendants were inmates of New York State penal institutions on November 3, 1975 when they were indicted in the Eastern District of New York. On November 5, 1975 separate writs of habeas corpus ad prosequendum were issued and the defendants were brought to the Eastern District of New York on November 19, 1975. The two defendants were arraigned and trial dates were set. The defendants were returned to state custody without being tried. The government again issued writs of habeas corpus ad prosequendum in March and April for the defendants presence

in the Eastern District. The indictments were challenged based on the Interstate Agreement. In affirming the dismissal of the indictment as required pursuant to the Interstate Agreement, the Courts in Mauro stated:

> We conclude that the writ of habeas corpus ad prosequendum is a detainer entitling the state inmate to the protection provided in Article IV and specifically to a trial before his return to the state institution. Any other construction would permit the United States to evade and circumvent the Agreement by simply utilizing the traditional writ.
>
> Mauro, supra, at 592.

Defendants urge the Court in the case at bar to similarly find that the writ of habeas corpus ad testificandum is the functional equivalent of a detainer under the Interstate Agreement. Defendants urge that any other result will enable the Government to circumvent and evade the Interstate Agreement, violate the defendants rights just as the Court feared and ruled against in Mauro, supra.

(C) THE FAILURE TO PROMPTLY ARRAIGN THE DEFENDANTS AGGRAVATED THE VIOLATION OF THE INTERSTATE AGREEMENT ON DETAINERS.

The Government further violated the defendants constitutional and due process rights when the Government failed to formally arraign HAND and EVANS on this indictment until after the first trial in the Southern District of New York. Said acts also served to confuse defense counsel as well as the defendants. The defendants were under indictments in three separate jurisdictions. They were not given the benefit of their constitutional and due process rights to a prompt arraignment until just prior to their second individual trials (ETT 46, HTT 11-13).

Such a technical violation of the law compounded the Government's violation of the interstate agreement.

The body of law on denial of arraignment suggests that a conviction may be reversed when the Government fails to arraign a defendant. Hamilton v. State, 368 U.S. 52 (1961) (on denial of counsel grounds).

Moreover, although some cases indicate that a defendant who proceeds through a trial, although never formally arraigned, cannot have his conviction reversed on arraignment grounds in the absence of specific prejudice, Bradford v. Lefkowitz, 240 F. Supp 969 (E.D.N.Y., 1965); United States ex. rel De Barry v. Follette, 395 F.2d 686

(2nd CIR. 1968); United States v. Bowman, 434 F.2d 243 (1st Cir. 1970); cert. denied, 401 U.S. 978 (1971); United States v. Ravich, 421 F.2d 1196 (2nd Cir. 1970), cert. denied 400 U.S. 834 (1970); the same cases cited above suggest that the lack of a formal arraignment may constitute a ground for challenge of a conviction if the defendant is prejudiced in some additional specific way. In the case at bar, the lack of arraignment coupled with the confusion to defense counsel and the defendants created by shuttling the defendants back and forth between jurisdictions raised the denial of arraignment from a mere technical violation to a clearly detrimental deprivation of constitutional rights. Hamilton v. State, 368 U.S. 52 (1961).

Defendants note that their forced presence in the Southern District of New York hampered, if not fatally destroyed, their attorney-client relationship with their attorneys in Philadelphia who represented them on two separate cases (indictments) there. Specifically Pennsylvania State, a homicide indictment and a federal bank robbery indictment in Philadelphia. Defendants were effectively denied access to their attorneys and witnesses at a crucial time in preparing their defense of the aforementioned cases which is clearly born out by their separate convictions on all of the aforementioned cases.

(D) ARTICLE IV(e) OF THE INTERSTATE AGREEMENT REQUIRES THIS COURT TO DISMISS THE INDICTMENT AGAINST THE DEFENDANTS.

The defendants were entitled to a prompt trial within 120 days after their arrival in the Southern District of New York following the Government's acting in obtaining the defendants presence in the Southern District of New York on April 20, 1976 from the Commonwealth of Pennsylvania. Interstate Agreement, Article IV; United States v. Mauro, supra, at 590-591.

The defendants were not brought to trial in the Southern District of New York until a joint trial commenced October 5, 1976. This trial began fully one hundred and sixty eight (168) days following the defandants arrival in the receiving jurisdiction the Southern District of New York.

Act IV(e) of the Interstate Agreement provides as a remedy for such a violation:

> If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

Accordingly, the defendants request this Court to order a dismissal of indictment 76 Cr. 502 pursuant to

Article IV(e), United States v. Mauro, 544 F.2d 588, 595 (2nd Cir. 1976); United States ex rel. Esola v. Groomes, 520 F.2d 830 (3rd Cir. 1975).

Motions were duly filed by the defendants' attorneys requesting the specific relief in regard to the interstate agreement, denial of which is appealed from herein. Specifically, defense counsel orally moved before the Hon. Thomas Griesa on June 1, 1976 and September 10, 1976, and formal papers submitted to Hon. Frederick Van Pelt Bryan on October 25, 1976, for a dismissal on grounds of the violation of the interstate agreement and on speedy trial grounds.

Appellant respectfully submits that the failure of the respected District Court Judges to grant the relief applied for should be rectified by this Honorable Court by ordering that the indictment upon which the instant appeal is based, be dismissed.

CONCLUSION

FOR ALL THE AFOREMENTIONED REASONS, THE JUDGMENTS OF CONVICTION IN THE TRIAL BELOW SHOULD BE REVERSED, AND THE INDICTMENT DISMISSED, OR, IN THE ALTERNATIVE, NEW AND SEPARATE TRIALS BE GRANTED.

Respectfully submitted,

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